

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH A. NEAL, as Personal Representative of
the Estate of DARRIUS GALLMORE, Deceased, and
DEBORAH A. NEAL, Individually,

UNPUBLISHED
August 19, 1997

Plaintiffs-Appellees,

v

No. 193049
Wayne Circuit Court
LC No. 93-319929

GROVER KELLY, JR., THE DETROIT BOARD OF
EDUCATION, BETTY HARDING DANIELS and
JOHN BUTKIEWICZ,

Defendants-Appellees,

and

ROSCOE GALLMORE,

Appellant.

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Appellant appeals as of right from an order approving the distribution of the proceeds of a wrongful death settlement. We affirm.

On May 4, 1993, Darrius Gallmore, who was seven years and seven months old, was killed in a school bus accident. Deborah Neal, Darrius' mother, brought a wrongful death action against defendants in her capacity as personal representative of Darrius' estate. After the parties to the underlying action reached a settlement that was approved by the trial court, appellant, Darrius' father and Neal's ex-husband, filed a claim for a portion of the proceeds of the settlement and participated in the distribution hearing pursuant to MCL 600.2922; MSA 27A.2922. After the hearing, the trial court approved the personal representative's proposed distribution, which awarded \$388,881.58 of the \$457,381.58 net settlement proceeds to Neal and \$2,500 to appellant.

After the awards were announced, appellant, through new counsel, filed a motion for reconsideration, asserting (1) that the distribution was void due to a conflict of interest on the part of the personal representative, (2) that the distribution of the proceeds should have been determined by a jury instead of the trial court, and (3) that he had been denied due process when the settlement agreement was reached by the parties without his input. Although he could have done so, appellant did not raise any of these issues or object to any of these alleged errors prior to or during the distribution hearing. The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least make a record of the error and its prejudice. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). A party cannot seek reversal on the basis of an error that the party caused by either plan or negligence. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993). Furthermore, counsel may not remain silent, electing to “take his chances” on a verdict and then later raise questions which could and should have been addressed in time for corrective judicial action. See *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987); see also *Kinney v Fokerts*, 84 Mich 616, 625; 48 NW 283 (1891); *Watson v Watson*, 204 Mich App 318, 319; 514 NW2d 533 (1994). Because appellant apparently chose to remain silent and “take his chances” on the outcome of the distribution hearing conducted under the circumstances that he now challenges on appeal, and because he did not raise the issues when the alleged errors could have been corrected, if necessary, we hold that the trial court did not err when it denied appellant’s motion for reconsideration, see MCR 2.119(F)(3), and that the issues first raised in appellant’s motion for reconsideration are not preserved for appeal. See *Napier, supra*; *Kinney, supra*; *Larned Associates*. Although we could elect to disregard the preservation requirements because appellant claims his constitutional rights were violated, we decline to do so because the issues now raised are meritless. Cf. *Watson, supra*; *Richards v Pierce*, 162 Mich App 308, 316; 412 NW2d 725 (1987).

Appellant’s final argument on appeal is that his portion of the distribution was insufficient. We disagree. Because the distribution of the settlement proceeds according to the relative damages sustained was a factual finding of the trial court, this issue is properly before this Court on appeal. See MCR 2.517(A)(7). A trial court’s distribution of wrongful death settlement proceeds is reviewed for clear error. *McTaggart v Lindsey*, 202 Mich App 612, 615-616; 509 NW2d 881 (1993). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

The wrongful death statute provides that the trial court must distribute the proceeds of a settlement among the various claimants designated in MCL 600.2922(3); MSA 27A.2922(3) and the estate in amounts that are fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. MCL 600.2922(6)(d); MSA 27A.2922(6)(d); *Hoogewerf v Kovach*, 185 Mich App 577, 579; 463 NW2d 160 (1990). “There is, of course, no precise formula for determining damages for loss of a loved one’s society and companionship.” *In re Claim of Carr*, 189 Mich App 234, 238; 471 NW2d 637 (1991). The only reasonable means of measuring the damages caused by the destruction of family relationships is to “assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship.” *McTaggart, supra* at 616.

The evidence presented at the distribution hearing showed that, for the first eight or nine months of Darrius' life, appellant lived with, looked after, and provided financial support for Darrius. After Neal and appellant separated, the evidence shows that appellant "almost completely shirked his parental duties." *McTaggart, supra* at 616. Appellant was convicted of two felonies and, as a result of his convictions, spent the later half of Darrius' life in prison during which time he was able to provide no financial or emotional support to Darrius. Consequently, appellant failed to develop a familial relationship with Darrius from which damages for the loss of society and companionship could result. See *id.* at 616-617; see also *Carr, supra* at 237-240; *Hoogewerf, supra* at 579-580. On the other hand, Neal lived with and cared for Darrius for his entire life. Furthermore, because appellant's contact with Darrius was so minor, we agree with the trial court that appellant's claim for loss of support and services was too speculative to support an award of damages. Therefore, we hold that the trial court did not clearly err in approving the proposed distribution. *McTaggart, supra* at 615-616.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gribbs